Decision 02-04-066 April 22, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order To Show Cause Why The Burlington Northern and Santa Fe Railroad Company and The Union Pacific Railroad Company Should Not Be Order To Comply with California Labor Code Section 6906	Investigation 99-06-005 (Filed on June 3, 1999)

ORDER DENYING APPLICATION FOR REHEARING OF DECISION (D.) 01-10-066

I. SUMMARY

By this order, we deny rehearing of D.01-10-066 ("the Decision") sought by the Union Pacific Railroad and The Burlington Northern and Santa Fe Railroad Company ("Applicants").

This proceeding is concerned with the issue of whether employees working as conductors in train service on California's two major freight railroads are properly qualified to do so under a California law that imposes experience requirements for such employment. Previously, the route to promotion to conductor was lengthy service as a brakeman, assisting the conductor in an apprenticeship capacity until the employee had sufficient experience to work as a conductor. This practice was codified in Section 6906(b) of the California Labor Code:

> "No common carrier shall employ any person as:
>
> …(b) A conductor who has not had at least two years' actual service as a brakeman in road service on a steam or electric railroad other then the street railway, or one

> year's actual service as a railroad conductor in road service."

However, technological improvements in locomotives and cars have in recent years eliminated many functions of the brakeman, and for many train operators it is a totally redundant position. Further, the job has been redefined by industry practice and collective bargaining agreements, rather than by statute or regulation.

The Commission initiated this formal investigation because the United Transportation Union reported that the railroads were violating Section 6906(b). On the basis of the staff's investigation, the Commission issued a formal Order to Show Cause to determine why the railroads should not be ordered to comply with the conductor qualification requirements of Section 6906(b). Hearings were not conducted, but two rounds of written testimony and briefs were filed. The railroads did not deny violation of the statute, but instead argued that it is unconstitutional and in violation of the Commerce Clause of the United States Constitution and is preempted by the Federal Railway Safety Act, by the Interstate Commerce Commission Termination Act and is also inconsistent with California's Railroad Anti-Featherbedding Act (Labor Code, Section 6900.5).

In the Decision, we agreed that the statute is unconstitutional. However, the Commission declined to so hold because Article III Section 3.5 of the California Constitution forbids the Commission from finding a state statute unconstitutional.

II. DISCUSSION

There is no serious dispute that the railroads are employing conductors in violation of the literal requirements of Section 6906(b). In fact, Applicants candidly admit that newly hired trainmen are generally promoted as conductors after a training period of well under one year. (Decision, p. 4.) There is also very little doubt that Section 6906(b) is unconstitutional. As long ago as 1914, the United States Supreme Court struck down a Texas statute that made it

unlawful for any person to act as conductor of a freight train without having previously served for two years as conductor or brakeman in Smith vs. Texas (1914) 233 U.S. 630. The case remains good law today. In fact, it was cited with approval by the California Supreme Court as recently as 1985 in Conservatorship of Valerie N. (1985) 40 Cal. 3d 143. It has also routinely been followed in other states to strike down years-of-service qualifications for rail employees. And not only have lower courts consistently held that time–in-service requirements are unconstitutional, the California Attorney General has agreed that such requirements are unconstitutional in 2 Ops. Atty. Gen. 157 (1943).

Applicants also convincingly argue that Section 6906(b) violates the Commerce Clause of the Federal Constitution, is preempted under the Federal Railway Safety Act, by the Railway Labor Act and by the Interstate Commerce Commission Termination Act. Applicants further argue that the statute violates California's Railroad Anti-Featherbedding Act (Labor Code Section 6900.5).

Applicants made all of these arguments during the course of the proceedings. In fact, the Commission characterized them as "not without merit" at p. 8 of the Decision. However, as pointed out above, Article III Section 3.5 of the California Constitution expressly provides that state administrative agencies may not declare a statute to be unconstitutional, unenforceable or preempted by federal law, or to refuse to exercise their enforcement powers on such grounds, unless an appellate court has declared the statute to be unconstitutional or unenforceable. No appellate court has expressly invalidated Section 6906(b). Applicants argue that the United States Supreme Court case above referred to, together with the California Attorney General's opinion, constitute sufficient appellate review to allow the Commission to hold the statute in violation of the Constitution. The argument is without merit. The Constitutional provision does not refer to appellate review of a similar statute, but to the specific California statute in question. Applicants also rely on Rees vs. Kizer (1988) 46 Cal. 3d 991, where the court stated that Article III Section 3.5 "cannot be reasonably be construed to

place a restriction on the authority of the legislature to limit the scope of its own enactments." (46 Cal. 3d at 1002) Applicants assert that because enforcement of Section 6906(b) would have the consequence of requiring them to employ unneeded brakemen for two years in order to qualify them for promotion, this would be contrary to the terms of their collective bargaining agreements, which would in turn conflict with Section 6900.5 by limiting its scope.

However, as the court explained in Rees, at page 1002:

> "Article III, Section 3.5, which was enacted by the voters in 1978, was placed on the ballot by a unanimous vote of the legislature in apparent response to this court's decision in Southern Pac. Transportation Co. vs. Public Utilities Comm. (1976) 18 Cal. 3d 308…in which the majority held that the Public Utilities Commission had the power to declare a state statute unconstitutional. [Citations omitted] The purpose of the amendment was to prevent agencies from using their own interpretation of the Constitution or Federal law to thwart the mandates of the legislature."

Contrary to Applicants' assertion that this case would permit Commission invalidation of a state statute, it is clear that the Court interpreted Section 3.5 to forbid any such action by the Commission. Just as the Commission may not invalidate a state statute because it is unconstitutional, it similarly cannot do so because the statute is in violation of a labor agreement entered into pursuant to Section 6900.5 of the Labor Code.

III. CONCLUSION

Applicants have made a convincing argument that the state statute in question is unconstitutional. However, as pointed out above, we may not hold a statute unconstitutional. We therefore have no choice except to deny the application for rehearing. Because we anticipate that Applicants will appeal this decision, we will stay the order for ninety days from the effective date.

THEREFORE IT IS ORDERED that:

1. Rehearing of Decision No. 01-10-066 is denied.
2. This order is stayed for 90 days from today.

Dated April 22, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners